

D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 2-A

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between NYNEX and the aforementioned companies.

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ORDER ON MOTIONS FOR CLARIFICATION OF AT&T AND NYNEX; MOTION FOR
RECONSIDERATION OF AT&T; AND MOTION OF AT&T TO STRIKE PHASE 2
COMPLIANCE FILING AND FOR ORDER REQUIRING NYNEX TO SUBMIT A
COMPLIANCE FILING COMPLYING WITH PHASE 2 ORDER

I. INTRODUCTION

On December 3, 1996, the Department issued an order in this proceeding which set forth our rulings with regard to the method to be used by New England Telephone and Telegraph Company, d/b/a NYNEX ("NYNEX"), in carrying out the avoided cost study for determination of the wholesale discount to be applied to the resale of telecommunications services. Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 2) (1996) ("Phase 2 Order"). The method employed by the Department was the one set forth by the Federal Communications Commission ("FCC") in its First Report and Order dated August 8, 1996 ("Local Competition Order").

On December 12, 1996, AT&T Communications of New England, Inc., ("AT&T") moved for clarification of the Phase 2 Order, seeking further description of the Department's treatment of six cost categories. On December 17, 1996, in conjunction with its compliance filing, NYNEX also moved for clarification with regard to two issues. On December 31, 1996, NYNEX filed a response to AT&T's motion for clarification, AT&T filed a response to NYNEX's motion for clarification, and MCI Telecommunications Corporation ("MCI") filed a response to both motions. Also, on December 31, 1996, AT&T filed a motion for reconsideration of treatment of the customer services account in the Phase 2 Order and an additional motion to strike NYNEX's Phase 2 compliance filing and for an order requiring NYNEX to submit a compliance filing that

complies with the Phase 2 Order. On January 13, 1997, NYNEX filed a response to AT&T's motion for reconsideration and motion to strike.

Before turning to the motions for clarification and reconsideration, we first address AT&T's motion to strike the December 17, 1996, compliance filing made by NYNEX. In this order, we clarify a number of concerns raised by the parties, and this clarification will require a new compliance filing by NYNEX. This Order, therefore, renders AT&T's motion moot at this time, and we deny it without prejudice. It is our intention to hold an informal conference on the revised compliance filing to identify outstanding issues. In light of some of our findings below, i.e., those in which NYNEX is asked to provide the derivation or otherwise support the inclusion of certain figures in its compliance filing, we expect that a formal hearing will be needed to resolve evidentiary questions that are likely to arise with regard to the compliance filing. A schedule for the informal conference and any formal hearings will be forthcoming from the Department.

II. MOTIONS FOR CLARIFICATION

In its December 17, 1996, motion, NYNEX properly sets forth the Department's standard for review of motions for clarification:

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

We review below the companies' requests for clarification in light of this standard.

A. Product Management (Account 6611)

NYNEX requests clarification as to whether the Department intended to adopt what it asserts is an FCC assumption that 90 percent of the costs in this account are presumptively avoidable and that 10 percent of the costs are not avoided. AT&T argues that the Department's Phase 2 Order clearly states that NYNEX has not rebutted the presumption that all product management costs are avoidable. We agree that AT&T has properly stated our conclusion.

In the Phase 2 Order, we noted that the FCC had, for purposes of establishing default wholesale discount ranges in paragraph 928 of the Local Competition Order, assumed that 90 percent of this account was avoidable. We cited that portion of the FCC's order to support our view that it was reasonable to assume that some portion of these costs should be considered not avoidable for purposes of constructing the wholesale discount. Phase 2 Order at 21. However, we did not intend, in so citing that paragraph, to adopt the specific number used by the FCC in its default calculations (although we noted that there was no specific basis cited by the FCC in support of its figure). The default section in the FCC's order is not controlling for determination of the state-specific number we seek to determine in this proceeding. The FCC made clear that the default rates were only to be used where a state had not completed its review of an avoided cost study, and the cited paragraph is simply part of the explanation of the method it had used to establish the default rates. Local Competition Order at 925 et seq.

For this proceeding, the controlling section of the FCC order is set forth before the default section, in paragraph 917, which states that all costs in account 6611 are presumed to be avoidable. These presumptions regarding accounts 6611-6613 and 6621-6623 may be rebutted if an incumbent LEC proves to the state commission that specific costs in these accounts will be incurred with respect to services sold at wholesale, or that costs in these accounts are not included in the retail prices of the resold services. Local Competition Order at 917.

In the Phase 2 Order, we found that NYNEX had made a persuasive case with regard to the general point of its argument, that a portion of these costs should be considered not avoidable. However, NYNEX failed to present evidence as to which "specific costs" in this account would be incurred in the wholesale environment. Instead, it asserted that all costs in account 6611 were not avoidable (Exh. NYNEX-5, at 9). We found that this conclusion had no substantive support and therefore concluded that NYNEX had not met its burden of proving that a specific number other than 100 percent avoidable was appropriate. Thus, our ruling was that 100 percent of this account should be considered avoidable in light of NYNEX's failure to rebut the presumption set forth by the FCC.

B. Sales (Account 6612)

AT&T seeks clarification of two issues with regard to the sales account. The first issue is AT&T's argument that \$49,326,000 of the expenses in this account are avoidable. NYNEX agrees with this point and states that it considered this amount avoidable in its compliance filing. Thus, it requires no further discussion or clarification.

The second issue concerns \$4,190,000 in expenses in this account related to enhanced 911 services and public coin related sales activities. AT&T does not take issue with NYNEX's exclusion of enhanced 911 service costs from the avoidable cost discount. It asserts, however, that costs related to public coin related sales activities are avoidable because NYNEX is required to provide its PAL service on a resale basis and because the costs associated with the sale of pay phone services arise from the sale of PAL service. In reply, NYNEX states that the \$4,190,000 is related to enhanced 911 and should therefore not be considered as avoidable.

Although NYNEX states in its reply that the entire \$4,190,00 is related to enhanced 911, its testimony states that the amount also includes expenses related to public coin related sales activities (Exh. NYNEX-5, at 10). We agree with the parties that amounts related to public coin related sales activities should be considered avoidable. The record, however, does not appear to contain the specific amount related to these activities. The absence of this figure is understandable given the phased nature of this proceeding and the fact that our Phase 1 Order may have been issued too late to ensure proper documentation of this figure during the Phase 2 proceeding. We therefore direct NYNEX to indicate the specific amount of this expense in its compliance filing and to exclude it from the \$4,190,000 figure.

C. Operations Testing (Account 6533)

AT&T seeks clarification that \$14,216,000 in this account be considered avoidable. NYNEX agrees with this point and states that it considered this amount avoidable in its compliance filing. Thus, it requires no further discussion or clarification.

D. Plant Administration (Account 6534)

AT&T seeks clarification of the treatment of this account in the avoided cost study. It asserts that it had submitted evidence that two percent of the expenses in this account will be avoided. NYNEX states that this account is treated as presumptively non-avoidable by the FCC and that therefore AT&T had the burden of showing that a portion should be treated as avoidable. It states that AT&T did not meet this burden of proof, as the number it presented had no support.

To clarify our order, we did not treat this account as avoidable because we found the testimony of AT&T's witness to be unpersuasive and based on an unsupported assertion. We did not address this issue in the Phase 2 Order because we did not read the AT&T brief in the case as advocating a particular number that had evidentiary support. Accordingly, NYNEX has properly treated this account as non-avoidable.

E. Operating Taxes (Account 7240)

AT&T seeks clarification on treatment of this account in the avoided cost study. It asserts that, because property taxes relate to land and buildings in the same way as the "land and building" expenses in Account 6121, which is a presumptively avoided indirect expense, operating taxes should be included as an indirect avoided cost. Thus, argues AT&T, the indirect-expense factor should be applied to this expense in the avoided cost study. NYNEX asserts that this account is not included in the FCC regulations concerning the determination of avoidable costs and that there is no provision to expand on these accounts in the review of the avoided cost study. It also asserts that plant-specific and plant non-specific expenses are presumptively not avoidable under the Local Competition Order.

In our Phase 2 Order we treated Account 6121 as an indirect expense, to which was applied an indirect-expense ratio to determine the percentage that should be considered avoidable in the avoided cost study. While AT&T's Mr. Goodrich offered testimony that the property taxes associated with land and buildings found to be avoidable should also be considered avoidable, there is no evidence to indicate which portion of property tax payments are related to general support assets (Tr. 1, at 170-171). Therefore, there is not a number in the record to which the indirect-expense ratio could be applied. We agree with NYNEX that AT&T's proposal to apply the ratio to all of the \$61 million in Account 7240 is clearly inappropriate in that it overstates the likely value of taxes in this category. Accordingly, NYNEX's interpretation of the Phase 2 Order is affirmed.

F. Portion of Depreciation and Amortization Expense (Account 6550) Associated with General Support Assets

AT&T requests clarification of this account in the avoided cost study, arguing that it should be treated as an avoided indirect expense. NYNEX states that it has treated the expense in this fashion in its compliance filing. Thus, it requires no further discussion or clarification.

G. Portion of Return on Capital Invested in General Support and Operator System Assets

AT&T requests clarification of this account in the avoided cost study, asserting that the return on capital invested in operator systems and general support assets should be treated as avoided costs. It states that this would be parallel to the treatment of depreciation and amortization expenses with regard to these assets. In response, NYNEX raises similar objections to those raised with regard to the property tax, above.

To clarify our Phase 2 Order, we did intend that the return portion of Operator and Directory Assistance ("O&DA") services should be treated in parallel with the depreciation and amortization expenses, for the same reasons set forth in the order with regard to Accounts 6220 and 6550, operator system expenses and depreciation and amortization associated with operator system assets. Phase 2 Order at 30-31. With regard to NYNEX's argument that such an adjustment is inconsistent with the "rules of the case", we note that the FCC explicitly found the concept of removing the return associated with avoided retail activities as consistent with the Act. Local Competition Order at 913. Thus, for wholesale customers who choose not to purchase O&DA services from NYNEX, the return on capital associated with operator system assets should be considered as avoidable. NYNEX's compliance filing should indicate the derivation of the figure it provides for this item.

Likewise, just as the amortization and depreciation of general support activities unrelated to any specific function that could be avoided have been treated as indirect avoidable costs, the return on such activities should also be so considered. NYNEX's compliance filing should indicate the derivation of the figure it provides for this item.

H. Treatment of EUCL Revenues

The avoided cost method requires the creation of a ratio of avoided costs to revenues. We have found that unseparated costs should be used in the avoided cost study. Phase 2 Order at 33-34. NYNEX states that it had removed the non-state-jurisdictional end user common line ("EUCL") revenues from its avoided cost study to provide a consistent calculation with its use of separated costs. It requests clarification as to whether it is appropriate, in light of the Phase 2

Order requiring unseparated costs, to include these EUCL revenues in the denominator of the ratio.

AT&T argues that NYNEX's motion is an attempt to raise an entirely new issue and urges that its attempted treatment of EUCL revenues be rejected. It states that NYNEX never raised the argument that EUCL revenues should be included as revenues in any avoided cost study, whether based on separated or unseparated costs. AT&T asserts that such revenues should be excluded from a determination of the avoided cost ratio because they are not revenues from the sale of local services that are being provided at wholesale. AT&T describes the EUCL as interstate access charges collected directly from the end user on the end user bill and further asserts that the EUCL revenues are not generated by cost-creating processes that bear any relationship to the avoided retail activities included in the numerator of the avoided cost calculation. The company argues that if the Department were to accept NYNEX's argument, it would effectively be treating the EUCL charge as a retail service subject to resale, with both retail revenues and retail avoided costs, and must therefore apply the wholesale discount itself to the EUCL charge.

MCI also disagrees with NYNEX, stating that inclusion of the EUCL revenues in the denominator would only be appropriate if the EUCL were a discounted rate element. MCI further notes that the Department has no jurisdiction over the interstate EUCL charges.

We agree with AT&T and MCI. As AT&T notes in its argument, NYNEX has never proposed to include EUCL revenues in the denominator of the fraction that creates the avoided cost ratio, whether in NYNEX's original avoided cost study using unseparated expenses in the

numerator of that fraction or its later study using separated expenses in the numerator of that fraction (Exh. NYNEX-5, at Attachment B, page 9, line 5; Exh. NYNEX-4, at Attachment A, line 20). This category of revenues is but one of many that are excluded by NYNEX in calculating the ratio in both cost studies. Others excluded are switched access revenues, special access revenues, state access revenues, directory revenues, and public/coin revenues. As NYNEX noted in support of its avoided cost studies, "Revenue accounts were analyzed to identify and remove from the discount calculation those revenues that would no longer be received from the reseller" (Exh. NYNEX-5, at 14). As suggested by AT&T, the EUCL revenues and these others are excluded because they are not relevant to the calculation of a discount for retail services subject to resale. Accordingly, to the extent the Phase 2 Order was unclear with regard to treatment of EUCL revenues, we clarify here that they should be excluded from the calculation of the avoided cost ratio.

III. MOTION FOR RECONSIDERATION

AT&T seeks the Department's reconsideration of a ruling in the Phase 2 Order concerning AT&T's contention that the level of costs claimed by NYNEX as not avoided within the customer service account (Account 6623) is unsupported. In particular, AT&T argues that the Department relied on information contained in the NYNEX brief that was not in the record of this proceeding and that the Department, therefore, found that the level of costs claimed by NYNEX as not avoided within this account is unsupported by record evidence.

The Department's standard for review of motions for reconsideration is as follows:

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983)....Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

If, as AT&T suggests, the Department's order was based on figures not in evidence, that would be grounds for reconsideration. We turn now to the specifics of AT&T argument.

AT&T argues that the figures contained in NYNEX's reply brief with regard to the calculation of the costs of six non-avoided activities within Account 6623 were not supported by evidence in the record. Indeed, says AT&T, the evidence in the record contradicts the figures in the brief.

The reply brief, notes AT&T, contains an assertion that the cost of these activities is about \$34 million and that this figure is derived from information response NYNEX-IR-AT&T 1-4. AT&T argues, however, that this information response does not provide the correct breakdown of these figures. Rather, it says, information response NYNEX-IR-AT&T 1-11 (2nd supplemental reply) contains a more accurate figure, \$20,886,000. Even this number, asserts AT&T, probably overstates the costs of the non-avoided activities, so that the total non-avoided costs in Account 6623 should be equal to no more than \$16,585,000.

In response, NYNEX states that there is record evidence to support its figure and that AT&T is simply seeking to relitigate the level of expenses in the customer service account under the guise of a motion for reconsideration. It points to its response to Record Request 1,

NYNEX-IR-AT&T 1-4, and NYNEX Exhibit 5 as support for the evidentiary basis for its filing.

It further asserts that the figures it presented in its brief were consistent with and based upon record evidence.

We have reviewed the record and find that NYNEX's contention is correct. The figures it presented in its reply brief were fully supported by record evidence. Accordingly, AT&T's motion is denied.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Motion for Clarification of AT&T Communications of New England, Inc., filed with the Department on December 12, 1996, be and hereby is GRANTED in part and DENIED in part; and it is

FURTHER ORDERED: That the Motion for Clarification of New England Telephone and Telegraph Company, d/b/a NYNEX, filed with the Department on December 17, 1996, be and hereby is DENIED; and it is

FURTHER ORDERED: That the Motion for Reconsideration of AT&T Communications of New England, Inc., filed with the Department on December 31, 1996, be and hereby is DENIED; and it is

FURTHER ORDERED: That the Motion of AT&T Communications of New England, Inc. "To Strike NYNEX's Compliance Filing and For an Order Requiring NYNEX to Submit a Compliance Filing that Complies with the Department's Phase 2 Order," filed with the Department on December 31, 1996, be and hereby is DENIED without prejudice; and it is

FURTHER ORDERED: That the parties comply with all other directives contained herein.

By Order of the Department,

John B. Howe, Chairman

Janet Gail Besser, Commissioner